United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 25, 2005

TO : Robert H. Miller, Regional Director
Region 20

Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: UNITE HERE Local 2 554-1450-0120
(San Francisco Hotels Multi-Employer Group) 554-1450-0140
Case 20-CB-12268 554-1450-0800
554-1450-7000

UNITE HERE Local 11
(Sheraton Universal Hotel, et al.)
Case 21-CB-13770

Regions 20 and 21 submitted these Section 8(b)(1)(B) and (3) cases for advice because they involve identical charges filed against different UNITE-HERE locals (collectively, the Unions). The charges allege that the Unions, in separate bargaining for successor contracts with multi-employer groups of hotels in San Francisco and Los Angeles, have each insisted on negotiating two-year agreements in an unlawful attempt to broaden the scope of their separate bargaining units and to merge them into a single national bargaining unit.

We conclude that the Unions' coordinated demands for two-year contracts are lawful mandatory subjects of bargaining because each local's proposal has a direct impact on terms and conditions of employment affecting the unit employees it represents, and there is no evidence that any local has conditioned reaching a contract on matters that do not pertain to the bargaining unit it represents. Accordingly, the Regions should dismiss the charges absent withdrawal.[1]

[1] We therefore need not consider the Charging Parties' requests for Section 10(j) injunctive relief.

FACTS

A. Background and Overview

Each charged-party local represents a unit of hotel workers employed by hotels that belong to one of two multi-employer bargaining groups (collectively, the Employers).[2] Thus, UNITE HERE Local 2 represents employees employed by the 14 employer members of the San Francisco Hotels Multi-Employer Group (SFMEG), and UNITE HERE Local 11 (Local 11) represents employees employed by the nine employer members of the Los Angeles Hotel Employers' Council (the Hotel Council).[3]

Collective-bargaining agreements between each local and its respective multi-employer group expired in 2004.[4] Negotiations for a successor contract in Los Angeles began in March 2004, and in July 2004 in San Francisco.[5] In mid-September, unit employees in both cities voted to authorize strikes, if necessary. Successor agreements have not been reached to date.

Labor agreements between various UNITE HERE locals and multi-employer groups in other major cities, including New York, Chicago, Boston, Honolulu, and Toronto, are set to expire in 2006. In this regard, the Unions here each proposed two-year contract terms in negotiations with their respective multi-employer groups. The Unions contend that by seeking contracts in San Francisco and Los Angeles that expire in 2006, they can increase their economic leverage now, as well as in 2006.

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[2] Hyatt and Westin hotels belong to both multi-employer bargaining associations involved. Other national hotels that belong to one of the multi-employer groups include Crowne Plaza, Hilton, Holiday Inn, Intercontinental, Omni, and Sheraton.

[3] The American Hotel & Lodging Association is also named as a charging party on each of the subject unfair labor practice charges.

[4] As set forth below, the Hotel Council and Local 11 agreed to extend their contract, which expired by its terms on April 15, 2004. The contract in San Francisco expired by its terms on August 14, 2004 and was not extended.

[5] All dates hereafter are 2004 unless otherwise indicated.

In late September, the Employers filed these identical Section 8(b)(1)(B) and (3) charges alleging that the Unions have bargained in bad faith by conditioning agreement on resolution of issues in other bargaining units in an unlawful attempt, backed by the International UNITE HERE union, to merge the current local bargaining units into a broader national unit without the Employers' consent.[6] The Unions deny that they are seeking to unilaterally expand the scope of their local units. Local 2 cites a recent five-year agreement UNITE HERE Local 54 reached in Atlantic City, New Jersey, despite local union demands for a three-year agreement that would expire the same year as union gaming contracts in Las Vegas and Detroit, as evidence that UNITE HERE does not control its local affiliates' bargaining.

In support of their charge allegations, the Employers rely on various public statements that UNITE HERE and its officials have made. For example, UNITE HERE International General Hospitality President John Wilhelm wrote that,

> The hotel industry has become a national and global industry. The time has now arrived for our Union to become a truly North American union in the hotel industry.
>
> Our industry faces serious national, not local, challenges. It is common sense that we sit down together, at the national level, in our two countries [Canada and the U.S.], to address the national challenges of rising health care costs, restaurant subcontracting, immigrant workers' rights, the hiring of African-Americans, and the rights of non-union hotel workers to organize.
>
> We have already begun to work as one union in our industry.

Wilhelm was also quoted as saying,

> By keeping hotel workers separated city by city, the companies believe they can more easily whittle away the middle class benefits that unionized union workers achieved many years ago. UNITE HERE is determined to do what it takes to prevent the Wal-Martization of hotel workers.

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[6] The Hotel Association of Washington, DC (HAWDC) filed a similar Section 8(b)(1)(B) and (3) charge against UNITE HERE Local 25, which had also demanded a two-year successor contract. However, the parties agreed to a three-year contract in January 2005, and HAWDC withdrew its charge.

And, at negotiating sessions in San Francisco and Los Angeles, Wilhelm stated that while UNITE HERE does not now propose national bargaining, due to market differences, some of the same issues affect workers in cities across the country and should therefore be addressed more broadly.

UNITE HERE General President Bruce Raynor said on National Public Radio that,

> You will not deal with us city by city. You will deal with us internationally. You will deal with us across the continent.

Raynor also stated, in the October 20 Daily Labor Report, that UNITE HERE is now a larger, stronger union working to organize and negotiate nationally, and that national bargaining would give it additional leverage in contract talks and in organizing markets that remain non-union. According to Raynor,

> When we negotiate with Hilton and Marriott and Hyatt, we want to negotiate not city by city where workers have no power, but nationally. We want to use the power of hotel workers in all those cities....[I]t is not practical anymore for [employers] to say, 'We get along with you in New York and Chicago, but we will fight you in Dallas and Houston.' We have to say to these corporations 'If you act as national corporations, we will act as a national union.'

A UNITE HERE newsletter stated that,

> Hotel workers in three cities voted to authorize strikes to demand equality and not allow the hotel industry to keep North American hotel workers in different cities separate from one another.
>
> * * * *
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> UNITE HERE members understand that...if hotel workers across the continent are kept separate in our respective cities when we are negotiating with global hotel companies, we will never be seen as equals like we deserve.
>
> * * * *
>
> [UNITE HERE members] are insisting on joining hotel workers in cities across North America, working for the same giant hotel companies, whose contracts expire in 2006, by negotiating two-year contracts now.

Additionally, during an on-line chat, Local 25 Executive Secretary and Treasurer John A. Boardman stated,

> The companies we deal with here in Washington are national chains with national labor relations strategies. In order for hotel workers to balance that kind of national power we must negotiate in the same manner -- nationally. The two-year term -- which is also on the table in Los Angeles and San Francisco -- will align [employees] with their counterparts in New York, Chicago, Boston, etc. whose contracts expire in [2006].

And UNITE HERE research analyst David Koff stated,

> Hotel chains have consolidated, much as the grocery chains have consolidated, and have been willing to take on any losses until workers are defeated, in a sort of war of attrition....What was good for the hotels was the mergers and consolidations. But when the workers stand up and say, 'We want to do the same thing,' they say, 'No.' [The hotels] say that it would be bad for the industry if the workers had a common national voice, because they didn't know whether or not their demands would be 'reasonable.'

B. Local Negotiations

1. San Francisco

Local 2 has been a party to successive five-year contracts with SFMEG or its predecessor since 1989, the most recent of which expired by its terms on August 14. Since bargaining for a successor contract began in earnest on July 20, the parties have met 19 times.

Local 2 has made 26 non-economic demands and SFMEG 12. Local 2 has failed to counter many of SFMEG's proposals, other than to reject them.

Local 2 has proposed either a two-year contract or one containing a reopener clause that gives it the right to strike after two years. SFMEG proposed another 5-year contract, although its website indicates that, as of January 21, 2005, its proposal includes a four-year contract term.

Although the parties have yet to agree on the contract's length, they have reached agreement on immigration and diversity, workload, expedited arbitration, subcontracting, and banquet scheduling practices. Each side

has also offered wage proposals (although Local 2's wage proposal contemplates a two-year agreement), and SFMEG has reduced its proposed maximum monthly employee health insurance contribution from $270 to $119.

At the parties' September 8 session, before a mediator, Local 2 presented a subcontracting counterproposal. On September 15, SFMEG announced that it would respond to the subcontracting proposal by noon and noted that the parties appeared deadlocked on contract duration. SFMEG stated that it was not altering its five-year demand and asked whether Local 2 was prepared to make any movement. Local 2 replied, "Hope springs eternal," and reiterated that, technically, its demand was not for a two-year contract, but for one that would permit it to strike in 2006. When SFMEG asked if anything would change its position on this issue, Local 2 said no. However, Local 2 asserts that this discussion must be considered in context: Local 2 was not obligated to counter its own proposal then on the table. Local 2 maintains that it remains open on all issues, including contract duration.

On September 29, Local 2 commenced a two-week strike against four of the 14 SFMEG hotels. On October 1, SFMEG implemented a lockout for the duration of the strike at its other 10 hotels, and after rejecting Local 2's unconditional offer to return on behalf of the striking employees, extended the lockout to all 14 member hotels on October 13.[7] Local 2 rejected SFMEG's offer to end the lockout in exchange for Local 2 withdrawing its two-year contract proposal. On November 20, however, the parties agreed to a 60-day cooling off period and the lockout ended on November 23.[8]

2. Los Angeles

Local 11 and the Hotel Council have a collective-bargaining history going back more than 20 years. Their most recent agreement, effective for six years, expired on

[7] Local 2 filed a Section 8(a)(3) charge alleging that the October 13 lockout was unlawful (Case 20-CA-32134, which Region 20 also submitted to Advice). The merits of that charge are addressed in a separate Advice memorandum.

[8] The cooling off period expired on January 23, 2005. However, the San Francisco Chronicle reported on January 22, 2005, that the parties will continue to negotiate and that neither a strike nor a lockout is contemplated in the near future.

April 15. The parties agreed to extend the contract on April 7 and again on April 28. On May 24, 2004, pursuant to the terms of their extension agreement, the Hotel Council gave Local 11 seven-days' notice that it intended to terminate the contract.

The parties first met to negotiate a new contract on March 19, and had held 15 bargaining sessions as of June 22, when the Hotel Council declared impasse and began to implement portions of its final offer.[9] The term of the contract remains a major issue in bargaining. Throughout negotiations, Local 11 has proposed a two-year contact. The Hotel Council initially proposed a six-year contract and later a five-year agreement, but has adamantly refused to agree to a two-year term. Despite this disagreement, the parties have made significant progress on other issues. After the Hotel Council declared impasse, the parties continued negotiating. They met once in July, four times in August and September with the assistance of a mediator, and once in December, reaching agreement on portions of non-economic proposals.

During the May 24 bargaining session, the parties discussed the term of the contract at length. The Hotel Council stated that the security a long-term agreement offered was valuable to everyone and asked Local 11 to explain how a two-year contract benefited employees. Local 11 replied that it was simply unimpressed with the Hotel Council's reasons for seeking a six-year contract. Following this discussion, Local 11 prepared a statement, submitted to the Hotel Council, explaining that it wanted a two-year contract because of the current uncertain economic times and the war in Iraq, and that because of these considerations, agreeing to a long-term contract would not be beneficial. Additionally, Local 11 explained that it wanted a contract that would expire in 2006 along with those of other UNITE HERE locals in the hotel industry.[10] Local

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[9] Local 11 filed a Section 8(a)(5) charge attacking the Hotel Council's conduct in this regard (Case 21-CA-36402, which Region 21 also submitted to Advice). The merits of that charge are addressed in a separate Advice Memorandum. In addition, we note that during Region 21's investigation of Case 21-CA-36402, the Hotel Council raised other alleged Local 11 conduct, not specifically alleged as violative of the Act in Case 21-CB-13370, as evidence of Local 11's bad faith. Absent an amended charge, we do not address those allegations here.

[10] According to Local 11, negotiating all of these contracts simultaneously would raise the stakes for all parties and, in turn, encourage a willingness to bargain.

11 explained that it was not bargaining for locals in other cities, but believed that it could make greater progress when hotel chains dealt with locals across the country. Local 11's statement gave two main reasons for its two-year proposal:

> 1. The costs of a potential labor dispute would be greater -- for both the union and the industry. That would make a settlement more likely, as everyone worked harder to keep a work stoppage from happening.
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> 2. Instead of having to move ideas around the country piecemeal, we could be developing master proposals. Not a national contract, but industry-wide solutions to the pressing problems that affect the whole industry. Now, after we make progress on something like immigration in one city, we then need to repeat the same process -- all the explanations, arguments, fact-finding -- in other cities. This is very inefficient. In the end, we think that doing this countrywide at the same time will be more efficient than the current staggering of negotiations and will in the long-term save time and money and produce better results. (Emphasis original.)

Local 11 also stated that it would not seek a short-term contract in the future because a long-term contract would make more sense once the parties had addressed and resolved national issues. Finally, Local 11 asserted that a two-year contract would be less disruptive to the industry as a whole.

Thereafter, the Hotel Council orally proposed a five-year contract term instead of its initial six-year contract proposal.

During the parties' June 1 bargaining session, the Hotel Council repeated its demand for a five-year agreement. According to Local 11, the Hotel Council stated that an improved contract would require Local 11 to agree to a five-year term. Local 11 questioned why it should do so without knowing the contract's specific terms. The Hotel Council allegedly replied that it would not agree to a two-year contract, and Local 11 stated that it could not agree to a five-year contract without knowing what the Hotel Council would offer on other subjects.

ACTION

We agree with the Regions that the charges should be dismissed, absent withdrawal, because the Unions' demands for two-year contracts, in order to coordinate their future negotiations with those of sister locals in other cities, are lawful. In this regard, we conclude that the Unions' contract demands do not amount to an unlawful attempt to merge their separate bargaining units into a national bargaining unit, because each local's demand has a direct impact on terms and conditions of employment affecting the unit employees it represents, and neither local has conditioned reaching agreement on resolution of any matter outside its bargaining unit. Therefore, even if the Unions were to insist on their contract duration demands to impasse or strike in support of them, this would not be unlawful.

It is well established that contract duration is a mandatory subject of bargaining.[11] In addition, the Board has held, with court approval, that coordinated union demands for the same contract expiration date are mandatory subjects of bargaining upon which it is lawful to insist to impasse.

Thus, in U.S. Pipe & Foundry[12] the Board dismissed a Section 8(b)(3) complaint alleging that two unions had bargained in bad faith by insisting on common contract expiration dates. The employer there operated manufacturing plants in Bessemer and North Birmingham, Alabama, and a third in Burlington, New Jersey. A different certified union represented each plant's employees, and contract negotiations were taking place at each plant during the same period of time. The unions at both Alabama plants demanded contract termination dates that would coincide at all three plants, to which the employer refused to agree. The Board upheld the trial examiner's conclusion that contract duration is a mandatory subject of bargaining and that insisting on a specific expiration date was not evidence of bad-faith bargaining. Further, the Board found it unnecessary to analyze the impact, if any, the unions' contract demands had on the scope of the certified single-plant units.[13]

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[11] See, e.g., ServiceNet, Inc., 340 NLRB No. 148, slip op. at 3 (2003). See also Lloyd A. Fry Roofing Co., 123 NLRB 647, 650 (1959)("The Board has long held that the term of a contract, like its substantive provisions, is a bargainable matter.")

[12] Steelworkers Local 2140 (U.S. Pipe & Foundry), 129 NLRB 357 (1960), petition for rev. denied 298 F.2d 873 (5th Cir. 1962), cert. denied 370 U.S. 919 (1962).

[13] 129 NLRB at 357 n.1.

In affirming the Board's order, however, the Fifth Circuit did discuss this issue. The court stated that a common expiration date for all three contracts had a "vitally important connection" to the terms and conditions of employment for employees at each plant.[14] The court explained that without common expiration dates, a union striking for a new contract "might have to 'bail with a sieve'" while the employer shifted production to one of its other plants, and stated that with a common expiration date it was obvious that a union might be able to negotiate a more advantageous contract for its employees.[15] The court further found that the importance of collective bargaining on questions affecting mandatory bargaining subjects overrode the apparent expansion of the bargaining unit, adding,

> [t]hat expansion is more apparent than real, for the very real, hard problem faced by each of the three unions, acting as the exclusive representative of the employees in its unit, is that a common expiration date for all three contracts vitally affects the ability of each union separately to bargain.[16]

The court concluded by noting that because, concededly, nothing prevented the employer from adamantly insisting that the contracts expire on separate dates, no valid legal reason precluded each union from steadfastly demanding identical contract expiration dates.[17]

Applying those principles here, we conclude that the Unions' coordinated two-year contract demands are lawful mandatory subjects of bargaining because they vitally affect each local's ability to bargain separately, and do not constitute an unlawful attempt to merge their separate bargaining units into a larger, national unit.

Thus, as the U.S. Pipe & Foundry court explained, the Unions' demands for common contract expiration dates here foster each local's ability to negotiate a more favorable

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[14] 298 F.2d at 877.

[15] Ibid.

[16] Id. at 878.

[17] Ibid. We note that the unions did not condition agreement at each plant on the employer and unions at the other plants reaching agreement on a common expiration date.

contract, and therefore vitally impact each unit's terms and conditions of employment. Although the court noted that common expiration dates would allow the unions there to counter the employer's ability to shift production among its plants in order to weather a strike at one of its facilities, we believe its rationale is equally germane here. Thus, we note that the Employers here include national chains (see n. 2, above) whose ability to operate in nonstruck cities will affect their ability to withstand a strike in another city. As such, and consistent with comments that both UNITE HERE and Local 11 officials have made, the Unions' coordinated demands for two-year contracts directly bear on each unit's economic leverage vis-à-vis its respective multi-employer bargaining association. Therefore, under U.S. Pipe & Foundry, the Unions' demands for common contract expiration dates vitally affect the ability of each local, acting as the exclusive representative of the employees in its unit, to bargain individually.

Moreover, as the Fifth Circuit noted in U.S. Pipe & Foundry, since the Employers may demand contracts that expire on different dates -- and in fact have done so -- no valid legal basis exists to hold that the Unions may not lawfully seek identical contract expiration dates.

Nothing in Phelps Dodge[18] precludes a finding here that the Unions' demands for two-year contracts are lawful. In Phelps Dodge, the Board found that the unions unlawfully insisted on companywide joint bargaining beyond the scope of the established bargaining units by conditioning negotiations covering four Arizona operations on simultaneous and satisfactory agreement on contracts in other units at other company locations, and by striking in support of that demand. Although the employer refused the unions' request to bargain jointly on a companywide basis, the Board found that the unions never abandoned their goal of a companywide master contract; the Board found that the unions' demands for a most favored nations clause, a limited no-strike provision, common contract expiration dates, and simultaneous settlement of all contracts, although otherwise mandatory subjects of bargaining, showed the unions' nonmandatory objective of enlarging the unit without the employer's consent.[19]

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[18] AFL-CIO Joint Negotiating Committee for Phelps Dodge, 184 NLRB 976 (1970), enf. denied 470 F.2d 722 (3d Cir. 1972), cert. denied 409 U.S. 1059 (1972).

[19] 184 NLRB at 976-977 and n.7. The Third Circuit found insufficient evidence to support the Board's conclusion that

Unlike the Board's findings in Phelps Dodge, here each local has conducted separate negotiations and there is no evidence that either of them has sought to bargain over matters pertaining to the other or conditioned reaching a contract on the Employers agreeing to demands made by the other. There is no evidence that the Unions here have even requested – much less demanded – nationwide bargaining. We conclude that the Unions' two-year proposals are mandatory subjects of bargaining, and the Unions could bargain to impasse or strike in support of them.[20]

Finally, we conclude that the Unions' lawful tactics now are not inconsistent with what UNITE HERE hopes to achieve in 2006: bargaining across the nation over matters of shared concern to its membership in cities across the country (e.g., immigration, diversity, and restaurant subcontracting). In this regard, the evidence does not establish that UNITE HERE or the charged party locals propose forming a national bargaining unit in 2006. However, even if the Unions were to make such a proposal in future negotiations, merely proposing such a unit would not be unlawful, so long as the Unions did not insist to impasse or strike over such a bargaining structure.[21]

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the unions' demands were offered to achieve the nonmandatory objective of enlarging the unit. 470 F.2d at 725-726.

[20] We find insufficient evidence to establish that either local has, to date, insisted to impasse on its contract duration proposal. Thus, Local 2 has stated that it would agree to a longer contract if it contained a reopener that gave Local 2 the right to strike in two years, and Local 11 has declined to agree to a longer-term contract until it knows more about the substantive provisions it would include.

[21] See, e.g., Detroit Newspapers, 327 NLRB 799, 800 (1999), enf. denied on other grounds 216 F.3d 109 (D.C. Cir. 2000), quoting Longshoremen ILA v. NLRB, 277 F.2d 681, 683 (D.C. Cir. 1963) ("It is...well established that a party 'has the right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it [does] not posit the matter as an ultimatum.'"). Cf. United Mine Workers of America Local 1854 (Amax Coal Co.), 238 NLRB 1583, 1587 (1978), enfd. in relevant part 614 F.2d 872 (3d Cir. 1980), rev'd on other grounds 453 U.S. 322 (1981) (union violated Section 8(b)(1)(B) by threatening to strike, and striking, in order to compel employer to bargain through a multi-employer association).

For the foregoing reasons, we conclude that the Unions' coordinated demands for two-year contracts are lawful and do not amount to an attempt to broaden the scope of their separate bargaining units and merge them into a single national bargaining unit. Therefore, the Regions should dismiss these charges, absent withdrawal.

B.J.K.